

***United States Court of Appeals  
for the Second Circuit***



**APPELLEE'S BRIEF**





*Original + Affidavit of Mailing*

**77-1298**

To be argued by  
CHERYL M. SCHWARTZ

**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 77-1298**

UNITED STATES OF AMERICA,

*Appellee,*

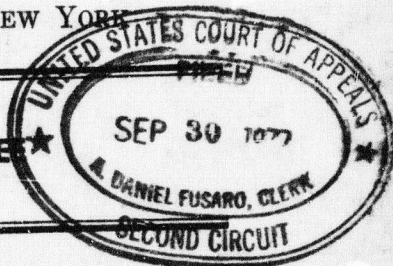
—against—

ROBINSON QUINONES,

*Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF FOR THE APPELLEE**



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**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

**Docket No. 77-1298**

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UNITED STATES OF AMERICA,

*Appellee,*

*—against—*

ROBINSON QUINONES,

*Appellant.*

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**BRIEF FOR THE APPELLEE**

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**Preliminary Statement**

Robinson Quinones appeals from a judgment of the United States District Court for the Eastern District of New York (Thomas C. Platt, J.) entered on July 1, 1977, convicting him, after a jury trial, of armed bank robbery and conspiracy, in violation of Title 18, United States Code, Sections 2113(d), 2 and 371. Appellant was sentenced to imprisonment for concurrent terms of twenty-five years and five years, respectively. He is currently serving his sentence.

Appellant presents various claims on appeal: *first*, that guns seized at the time of the arrest of his accomplice, Frank Tillman Lewis, should have been suppressed, *second*, that the post-arrest statements of Lewis should have been excluded at appellant's separate trial, *third*, that testimony concerning out-of-court identifications by eyewitnesses was improperly admitted, *fourth*, that the court should have granted a mistrial when an eyewitness

who did not testify at the pre-trial photographic identification hearing identified appellant in court, *fifth*, that three weapons seized at the time of appellant's arrest should have been excluded, and *sixth*, that certain of the questions posed to appellant's witness, Lewis, on cross-examination were improper and that the court improperly cited Lewis for contempt in the presence of the jury at appellant's trial.

## Statement of Facts

### A. The Trial

#### 1. The Government's Case

At approximately 9:15 A.M., on January 3, 1977, the Barclay Bank of New York, 2215 Church Avenue, Brooklyn, New York, was robbed of approximately \$11,800 by appellant and his co-conspirator, Frank Tillman Lewis. The two men arrived at the bank and escaped from the vicinity in a hired limousine. They left New York the next day for Miami Beach, where they stayed for ten days. They then returned to New York where they were eventually apprehended.

The evidence against appellant consisted of testimony placing him in and near the bank at the time of the robbery, the recovery of weapons used in the robbery from a hotel room in which appellant was registered, the seizure from appellant at the time of his arrest of weapons similar to those used in the bank robbery, and a statement made by appellant at the time of his arrest. Richard Casciano, a driver employed by the Park Ridge Limousine Service, testified that he drove appellant and his accomplice to and from the vicinity of the bank on the day of the robbery. Tunner Davis, the bank guard, testified that appellant disarmed him and vaulted the tellers' counter in the bank to collect the money. Vincent

Brown, a customer in the bank, followed the accomplice out of the bank and saw him and another man, alleged to be appellant, enter the limousine driven by Casciano. At the time of the arrest of appellant's accomplice, the gun which had been taken from the guard and a gun which had been fired in the bank during the robbery were recovered in the hotel room in which appellant and his accomplice were registered. Appellant escaped apprehension at the hotel. After successfully avoiding apprehension for another ten weeks, when finally placed under arrest, appellant stated, "Admit it man. I'm the best." And recovered from appellant at the time of his arrest were handguns similar to those used in the robbery.

On the morning of January 3rd, a man calling himself "Mr. LaRosa" called the Park Ridge Limousine Service in Brooklyn and hired a car for the morning. The car and its driver were met at a designated location at 8:30 A.M. by appellant, who was joined shortly thereafter by Lewis. Richard Casciano, the driver of the limousine, who had driven Lewis on a prior occasion and knew him as "Mr. Lovell," later identified LaRosa and Lovell as appellant and Lewis, respectively (T. 43-48).<sup>1</sup>

After appellant and Lewis entered the limousine, a white Cadillac Fleetwood, they instructed Casciano to drive to the corner of Bedford and Martense Avenues in Brooklyn, New York. Once there, they left the car and returned about five minutes later (T. 48). Casciano was then instructed to go to the corner of Church and Flatbush Avenues, also in Brooklyn, and at this location, appellant and Lewis again left the car (T. 48). Walking from the car, the two men entered the Barclay Bank

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<sup>1</sup> Numbers in parentheses preceded by "T" refer to pages of the trial transcript. Numbers in parentheses preceded by "H" refer to pages of the transcript of the pre-trial suppression hearing.



at 2215 Church Avenue, posing as customers. Lewis positioned himself near the front entrance, while appellant walked toward the tellers' counter. (T. 33, 170). When the bank guard, Tunner Davis, asked appellant to go to the rear of the customer line, appellant pulled out a gun, pointed it at Davis' head and disarmed him (T. 33, 126-127, 170).

Almost simultaneously, Lewis pulled out his gun and ordered everyone in the bank to get down onto the floor (T. 33, 171-172). Appellant then pulled a mask over his face, tucked two guns into the waistband of his pants, vaulted the counter and ordered the tellers to ~~all~~ the bags which he had with him with money (T. 34, 171). When one of the tellers moved, appellant told her not to move or he would kill her (T. 34).

While appellant was stuffing his bags with money, a would-be customer entered the front door and, after seeing what was happening, tried to exit. Lewis grabbed her, however, hit her on the side of her head, and pushed her to the floor (T. 130, 172). He then threatened to kill her if she moved (T. 172). After the scuffle, two shots were fired by Lewis. Fortunately, however, no one was injured. (T. 130, 173).<sup>2</sup>

After collecting the money from the tellers' drawers, appellant vaulted the tellers' counter and joined Lewis near the entrance of the bank, where the pair put the stolen money into an attache case carried by Lewis (T. 173, 174). After shouting, "Nobody move for ten minutes," Lewis followed appellant out of the bank (T. 174-175).<sup>3</sup>

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<sup>2</sup> A bullet and a spent cartridge were recovered from the floor near the entrance of the bank (T.104-105).

<sup>3</sup> The Barclay Bank of New York was insured on January 1, 1977, by the FDIC. An audit determined that \$11,822 was taken in the robbery. (T. 264-265).



Outside, the two robbers rounded the corner, got into the waiting Cadillac and ordered Casciano to proceed down Flatbush Avenue (T. 175-178, 142, 49). Then, after appellant remarked that the white car made him nervous, Casciano was directed to return to the corner of 8th Avenue and Carroll Street, where he had originally picked up appellant and Lewis. The car arrived at that location at approximately 9:20 A.M. (T. 49-50), and appellant and Lewis paid Casciano fifty dollars in cash, which represented a twenty dollar tip for a thirty dollar fee (T. 51).

Appellant and Lewis, now using the aliases of Thomas LaRosa and Kenneth A. Smith, went to Miami Beach, Florida, the next day, where they stayed in a hotel until January 13th (T. 74). They paid the hotel bill, amounting to over \$1600, in cash (T. 79). They then returned to New York and registered at the New York Hilton Hotel in Manhattan under the same names (T. 208-209).

By this time, Lewis had been positively identified by Casciano and by a customer in the bank. A warrant for his arrest had been issued, and he was apprehended on the morning of January 15th in his room at the Hilton Hotel (T. 209). Two guns were seized from the room at the time of the arrest; one was the gun taken from the bank guard and the other was the gun which had been fired during the course of the robbery (T. 110-111, 128-129, 212-213). At the time of his arrest, Lewis exclaimed to the FBI agents and New York City detectives, "I am guilty. Money is my bag" (T. 218).

Meanwhile, in the belief that appellant would come to the hotel room, New York City police waited to arrest him on State charges (T. 114). When appellant entered the

room, however, he spotted the detectives and fled the building brandishing a revolver (T. 116, 143-144).<sup>4</sup>

Appellant was later apprehended and arrested at 284 Atlantic Avenue, Brooklyn, New York, on March 31, 1977 (T. 223-234). FBI Agent Michael Henahan was the first to reach appellant in the apartment where he was hiding. Upon seeing appellant, Henahan ordered, "FBI. Freeze!", to which appellant responded with a smile, "Admit it man. I'm the best" (T. 190-191). Immediately following the arrest, the agents seized two handguns and a sawed-off shotgun which were in plain view and within reach of appellant. (T. 225-229).<sup>5</sup>

## 2. The Defense Case

Appellant called, as his only witness, his accomplice, Frank Tillman Lewis.<sup>6</sup> Lewis stated that he had been convicted of robbing the Barclay Bank on January 3, 1977. He also admitted that he had been in a Park Ridge Service limousine near the intersection of Flatbush and Church Avenues on the morning of the robbery, but he testified that appellant was not with him in the limousine; rather he said he was accompanied by an acquaintance known to him only as "Jose" (T. 313-335).

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<sup>4</sup> When he fled, appellant used a chambermaid, Edna Bouyer as a hostage-shield. (H. 246-251) This evidence, however, was not before the jury.

<sup>5</sup> Also seized were a practice handgrenade and eight Federal Reserve Notes which proved to be money taken in a New Jersey Bank robbery two weeks prior to appellant's arrest. The Government did not offer these items into evidence at trial.

<sup>6</sup> In a separate trial, Lewis was convicted of the Barclay's robbery and conspiracy to rob the Barclay Bank. He was sentenced to a total of thirty years imprisonment on April 29, 1977. His conviction is on appeal to this Court, Docket No. 77-1224. Appellant called Lewis as a witness against his attorney's advice. Defense counsel told the court that after five hours of talking with Lewis, he still did not know what Lewis's testimony would be on the witness stand (T. 270).

In explaining how he came to be in the vicinity of the bank, Lewis stated that he was a professional gambler and that through this activity, he had met "Jose" two weeks earlier (T. 339-340).<sup>7</sup> Lewis and Jose had planned to go to Yonkers on business that morning, so, Lewis said, he took a taxi to Brooklyn where he phoned for a limousine, using the name of "LaRosa" (T. 313, 322). Lewis testified that after the limousine arrived at about 8:30 A.M., he entered the car, finding "Jose" already inside (T. 314). The pair then drove to the vicinity of Flatbush and Church Avenues, where they left the limousine for about 15 minutes. When they returned to the car, Lewis had the driver return Jose and him to the corner of Carroll Street and 8th Avenue in Brooklyn (T. 350, 362-363). He then returned to Manhattan. Lewis emphasized that appellant was not in the limousine with him that morning and that to Lewis's knowledge, was not in the vicinity of the bank and had no knowledge of the bank robbery (T. 315-316).

On January 4, 1977, according to Lewis's testimony, appellant accompanied Lewis to Miami Beach. Lewis said that he had suggested traveling under the aliases of "Kenneth A. Smith" and "T. LaRosa" (T. 316-319), and that appellant agreed to the use of the aliases with little objection (T. 319). After about a week, Lewis testified, they returned to New York. Lewis then registered both of them, again under the aliases, at the New York Hilton, where he stayed, and at the "Americana Squire," where appellant stayed (T. 319).

Lewis also explained his relationship with appellant. He stated that he had known appellant's family for about ten years (T. 317-318) and that appellant now served

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<sup>7</sup> Lewis said that he did not know where Jose lived, but when he wanted to contact Jose, he would go to a part of the Bronx which was Jose's "hangout spot" (T. 340-341).



as his personal valet (T. 317-318). Lewis said that he paid all expenses for appellant (T. 324).

During his testimony, Lewis twice refused, on cross-examination, to comply with the court's order to answer questions and was held in contempt.<sup>8</sup>

## **B. The Pre-Trial Hearing**

### **I**

A pre-trial hearing was held to determine the admissibility of the weapons seized at the time of the arrests of Lewis and appellant and the reliability of the out-of-court identification of the robbers by eyewitnesses. Testimony at the suppression hearing revealed the following:

FBI Special Agent Leo Farrell, along with other special agents of the FBI and New York City police officers, early in the morning of January 15, 1977, placed themselves near the door of Room 2620 of the New York Hilton, which room was registered to a "Kenneth A. Smith" and "Thomas LaRosa" (H. 17-20). After the agents identified themselves to the occupants of the room, Lewis, who was inside, threatened to kill a woman companion who was with him; Lewis then exited the room, shielding himself with the woman (H. 24-26).

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<sup>8</sup> Lewis was directed by the court to answer the questions "...did you go into Barclay's Bank?" and "Did Jose go into the bank with you?" Lewis persisted in refusing to answer each question with a "yes" or "no" and relied on the "records" of his trial, at which he had not testified (T. 352-354, 361). He did not assert a Fifth Amendment privilege. The court found his conduct contemptuous and cited him for contempt twice. He was subsequently sentenced to six month's imprisonment on the contempt; he has appealed this conviction as well as his bank robbery conviction, Docket No. 77-1224.



The agent arrested Lewis and immediately searched the room for hidden confederates, and finding none, brought Lewis back into the room (H. 27). Lewis was given his *Miranda* warnings. Then, in response to the agents' questions, Lewis said there was a gun under the bed and one in his attache case. The agents recovered from under the bed the gun that was taken from the bank guard, and from the attache case, a .25 caliber automatic Mauzer, one of the guns which had been fired in the bank (H. 27-28). Shortly thereafter, during further questioning by agents, Lewis stated, "Yes. I'm guilty. Money is my bag." (H. 35-36).

Agent Farrell was also present during the arrest of appellant, pursuant to a bench warrant of the court, on March 31, 1977, at 284 Atlantic Avenue, Brooklyn, New York. Investigation by the FBI had determined that appellant was staying in an apartment at that address (H. 40). After verifying that appellant was in the apartment and upon obtaining consent to enter, Agent Michael Henahan and other agents went into the apartment and placed appellant under arrest (H. 146-147, 150).<sup>9</sup> Appellant was found in the bedroom of the apartment, standing next to the bed. On a bureau nearby were two .38 caliber revolvers; on the floor at the base of the bureau was a briefcase, with the butt of a sawed-off shotgun sticking out. These weapons were seized by the agents (H. 46-47).

## II

Agent Farrell also testified about showing photographic spreads to various witnesses, among whom were the bank guard, Tunner Davis, the limousine driver,

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<sup>9</sup> The agents interviewed, on the street outside the building, the woman in whose apartment appellant was staying. They obtained from her an oral consent to enter and search (H. 146-147).

Richard Casciano, a customer in the bank, Norma Sharpe, and a chambermaid at the Hilton, Edna Bouyer. Casciano and Bouyer testified at the hearing.

Following the robbery, Farrell assembled a group of ten photographs, one of which was a picture of appellant's accomplice, Lewis, whom the FBI had reason to believe had been involved in the crime (H. 61). On January 5, 1977, two days after the robbery, Farrell displayed the photographs to Norma Sharpe, who had been in the bank during the robbery, and to Tunner Davis, the guard. Mrs. Sharpe identified the picture of Lewis as one of the robbers, but Mr. Davis was unable to identify any of the photographs (H. 61-63). Between January 6th and 8th, Agent Farrell displayed the same set of photographs to Mr. Casciano, who identified Lewis as one of the passengers in the limousine on the morning of January 3rd (H. 63).<sup>10</sup>

On January 18, 1977, Agent Farrell made a second photo spread, consisting of six photographs, including appellant's (H. 67-68). He showed the spread to the same three witnesses, and only Mr. Casciano was able to identify anyone (H. 68). Casciano identified appellant's photograph as a picture of the other passenger in the limousine, "Mr. LaRosa" (H. 68, 276). Casciano stated at the hearing that the agent who showed him the spreads did nothing to suggest who the suspect was and did not tell him he had made a proper identification (H. 282-283).

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<sup>10</sup> Sometime afterwards, the FBI inadvertently misplaced the photographic spread and as a result had to show a duplicate group of photographs to Mrs. Sharpe (H. 63-64). Agent Farrell testified that when he showed the duplicate set of photographs to Mrs. Sharpe on January 25th, she again identified Lewis as one of the robbers (H. 63).

Edna Bouyer made identifications of appellant on two occasions. At the hearing, Mrs. Bouyer testified that at about noon on January 15, 1977, while she was cleaning Room 2405 at the Hilton, a man she later identified as appellant, entered the room and slammed the door behind him (H. 246). Someone then knocked on the door, and appellant shouted that he had a hostage whom he would kill (H. 248). Appellant then forced Mrs. Bouyer to accompany him down an elevator and out to the street, where he got into a cab and drove away (H. 247-250). He held a gun to her back all the way out of the building and told her, "I'm going to die, you'll die also" (H. 250).

After appellant escaped, Mrs. Bouyer returned to the Hilton where she was interviewed by the police detectives who had been waiting for appellant in Room 2620 (H. 250-252). At that time, they showed her various photographs, which had been found in Lewis's attache case, and Mrs. Bouyer identified from these pictures a photograph of appellant as the man who had kidnapped her (H. 252). Approximately three months later, Agent Farrell showed Mrs. Bouyer the photographic spread containing appellant's picture (H. 72, 166-167). Mrs. Bouyer again positively identified appellant as the man who had forced her to accompany him (H. 253-253a).

### III

At the close of the hearing, appellant stated his grounds for challenging the admissibility of the weapons seized from the room at the Hilton and the propriety of the photographic identification procedures.<sup>11</sup> Pertaining to the seizure of the weapons at the hotel room, coun-

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<sup>11</sup> Appellant did not challenge the seizure of the guns from the apartment where he was arrested because he could not produce any testimony to contradict the Government's proof of consent to search.



sel argued that the seizure could not be justified as the result of a search incident to arrest. He contended that once Lewis had been arrested outside the room, it was improper for the agents to return him to the room and suggested that the agents contrived to return Lewis to the room so that they could search it. However, the court found that because an accomplice (appellant), who was believed to be in the vicinity, was still at large and because Lewis had "insufficient clothes on", the agents had properly returned Lewis to his room. The court further noted that both guns were close by and that the presence of the guns in the room constituted a grave danger to the agents and others in the hotel (H. 285-287). Accordingly, the court denied the motion to suppress the weapons.

As to the photographic identifications by Mrs. Bouyer, appellant argued that since she had been shown a photograph of appellant immediately after the abduction, this act irreparably tainted her future identifications. The court ruled that Mrs. Bouyer's being held at gunpoint made an irreparable impression on her and that her identification of photographs thereafter would be reliable (T. 293-294). Appellant also contended that the spread was impermissibly suggestive, but the court found it was fair (H. 318-319).

Appellant conceded that he had no standing to object to the obtaining of Lewis's post-arrest statement "I'm guilty. Money is my bag", but he objected that the statement was inadmissible hearsay. After a lengthy dialogue, the court found that the statement was material to the aiding and abetting charge. Since the Government charged that appellant aided and abetted Lewis, the court reasoned that the Government could prove not only that appellant aided and abetted another, but that the person he helped was Lewis, the named co-defendant (H. 300-313).

Finally, appellant conceded that there was no basis to challenge Mr. Casciano's identification.

## **ARGUMENT**

### **POINT I**

#### **The Guns Seized In The Room In The New York Hilton Were Properly Admitted Into Evidence.**

Appellant argues that the warrantless seizure of the .38 caliber revolver taken from the bank guard and the .25 caliber Mauzer fired in the bank was improper, and that the evidence should have been suppressed. As noted above, both weapons were seized at the time of the arrest of Lewis, one gun being found under the bed, the other in an attache case in the room in which he and appellant were registered in the New York Hilton. Appellant claims that the seizure cannot be justified as resulting from a search which was incident to a lawful arrest or which was the product of a voluntary consent. We disagree.

We address first the question of standing. We argued below that appellant and Lewis shared the room at the Hilton from which the guns were seized (T. 402). Although appellant's own witness, Lewis, testified that appellant was in fact staying at another hotel, a fact which would indicate appellant's lack of standing, the Government's proof showed that both were registered in the room at the Hilton, that appellant had a key for the room, and that there were two different size pairs of tennis shoes in the room, all of which would give rise to the inference that appellant had access to the room and may have occupied it long enough to put his shoes there. Therefore, the Government does not contest on appeal appellant's standing to challenge the seizure of evidence

from the room. *Mancusi v. DeForte*, 392 U.S. 365, 368 (1968). We submit, however, that appellant lacks standing to challenge the search of the attache case and the seizure of the gun fired in the bank therefrom.

A defendant can establish standing to contest a search and seizure in one of two ways. First, he may have automatic standing, a doctrine enunciated in *Jones v. United States*, 362 U.S. 257, 263-265 (1968), and whose validity has been cast in doubt, *Brown v. United States*, 411 U.S. 223 (1973); *United States v. Pui Kan Lam*, 483 F.2d 1202, 1205, n.4 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974). However, the automatic standing rule is not applicable where, as in the instant case, the defendant is not charged with a possessory offense, *Brown v. United States*, *supra*, 411 U.S. at 229.

A defendant can also assert actual standing when he can establish that he was "the victim of an invasion of privacy." *Jones v. United States*, *supra*, 362 U.S. at 261, and where the defendant himself can show that he was entitled to "a reasonable expectation of freedom from governmental intrusion." *Mancusi v. DeForte*, *supra*, at 368 (1968). A defendant can demonstrate an expectation of privacy by showing either a proprietary or possessory interest in the place invaded, *Brown v. United States*, *supra*, 411 U.S. at 229. However, in the instant case, appellant has demonstrated neither a proprietary nor a possessory interest in the attache case. The attache case was not wrested from his control, nor did he claim to own the attache case. The gun found therein, the Mauzer, was shown to have been used by Lewis, not appellant. Moreover, the fact that Lewis knew the combination to the attache case indicates that it was his, not appellant's, case. Nor does the fact that appellant has standing to challenge the search of the room in which the attache case was found give him standing with respect to the interior of the case, for he has failed to demonstrate that the interior of the case was



an area where he had "a reasonable expectation of freedom from governmental intrusion." Cf. *United States v. Miller*, 449 F.2d 974, 977-978 (D.C. Cir. 1971), defendant lawfully in a doctor's office had standing to challenge the entry of the police into the room; he lacked standing, however, to contest the search of drawer, in the same room, which he had no authority to use.

Thus, we submit that appellant's lack of either a possessory or a proprietary interest in the attache case and in the gun itself deprives him of standing to contest the search of the case and the seizure of the gun found therein.<sup>12</sup> Questions of standing aside, however, it is clear that the seizure of both weapons in the room was proper.

Prior to the arrest of Lewis, the agents and police telephoned the occupants of the hotel room and asked them to surrender. After shouting that he had a woman with him whom he would kill, Lewis opened the door, using the woman to shield himself. At this point, the woman was pulled out of the way and Lewis was extracted from the room, frisked and handcuffed (T. 26). In the belief that appellant or others may have been hiding inside, the agents entered the room and searched for another person. Finding no one, they brought Lewis back into the hotel room so that he could dress. Lewis then was given his *Miranda* warnings and replied that he understood his rights. When asked if he had any guns, he replied that he had, and when asked where the guns were, he told the agents that there was one under

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<sup>12</sup> The United States did not contest at the pre-trial hearing appellant's standing to challenge the search of the attache case. However, we are not precluded from arguing this issue on appeal because standing is a question of law, and a concession on a question of law is not binding on the court. *United States v. Tortorello*, 533 F.2d 809, 812 (2d Cir.), cert. denied, 429 U.S. 894 (1976).

the bed on which he was sitting and one in an attache case at the foot of the bed. Lewis provided the combination for the attache case, which was locked (T. 28).

A warrantless search and seizure is valid if conducted pursuant to a voluntary consent. *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). In determining whether consent is freely and voluntarily given, the court must look at the totality of the circumstances, under which it was obtained. *Schneckloth v. Bustamonte*, *supra*, 412 U.S. at 227; *United States v. Faruolo*, 506 F.2d 490 (2d Cir. 1974). Factors to be considered include, when as here applicable, the giving of *Miranda* warnings, the length of detention, the number of times permission is asked, and the absence of threats or coercion. *Schneckloth v. Bustamonte*, *supra*, 412 U.S. at 226. In the instant case, Lewis was given his *Miranda* warnings immediately and had only been in detention a few minutes when asked by the agents where the guns were. There is no allegation that the agents threatened or coerced him to consent. Moreover, he gave the information about the guns in response to only one question. And the fact that he was in custody is clearly not sufficient in itself to invalidate the consent. *United States v. Watson*, 423 U.S. 411 (1976).

In an analogous case, a defendant was arrested for transporting hand guns and was asked whether he had any of the guns he was accused of illegally transporting. The defendant responded by simply pointing to a carton five feet away and to a desk drawer. The court upheld the search as based on voluntary consent and noted that knowledge that a search will demonstrate guilt does not negate the possibility of a voluntary consent. *United States v. Candella*, 469 F.2d 173 (2d Cir. 1972). Indeed, even where a defendant gives consent because he feels that objecting to the search would be ineffective,

courts have refused to infer coercion. *United States v. Thompson*, 356 F.2d 216 (2d Cir. 1965). In short, there is no indication that the consent here was anything but voluntarily given.

In addition, an arresting officer may search the area within the immediate control of a defendant, from which he might gain possession of a weapon. *Chimel v. California*, 395 U.S. 752, 762-763 (1969).<sup>13</sup> In the instant case, one weapon was underneath the bed on which Lewis was sitting and the other was in an attache case a few feet from him. Both weapons were therefore in his immediate control.<sup>14</sup> Moreover although Lewis was placed in custody in the hall just outside of his hotel room, his accomplice was still at large and might have returned at any time or might have emerged suddenly from a neighboring room. Rather than risk a confrontation in the hallway, and in order to protect innocent passers-by, the agents were justified in bringing Lewis back into the hotel room to allow him to dress. Once inside, they had the right to search the area within the immediate control of Lewis, to insure their own safety.<sup>15</sup> *United*

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<sup>13</sup> Appellant does not challenge the legality of Lewis's arrest.

<sup>14</sup> The fact that one of the weapons was in an attache case, which was readily accessible to Lewis, does not take it out of the *Chimel* doctrine. See, e.g., *United States v. Frick*, 490 F.2d 666, 669 (5th Cir. 1973), *cert. denied*, 419 U.S. 831 (1974); *United States v. Mehciz*, 437 F.2d 145 (9th Cir. 1971), *cert. denied*, 402 U.S. 974 (1971).

Nor does *United States v. Chadwick*, — U.S. —, 97 S. Ct. 2476 (1977), invalidate the search. The court in *Chadwick* reiterated the *Chimel* doctrine but found on the facts before it that the search was not incidental to arrest because it was remote in time and place from the arrest and unjustified by exigent circumstances. Here, the search was made immediately and was justified by the exigent circumstances of an at-large accomplice and danger to the agents.

<sup>15</sup> Lewis had been classified "Armed and Extremely Dangerous." In addition, the bank robbery was a particularly violent one.



*States v. DiStefano*, 555 F.2d 1094, Docket Nos. 76-1581, 76-1582, Slip op., p. 3539 (Second Circuit, May 16, 1977); *United States v. Titus*, 445 F.2d 577 (2d Cir. 1971), *cert. denied*, 404 U.S. 957 (1971); *United States v. Montiehl*, 526 F.2d 1008 (2d Cir. 1975).

Finally, the weapons would inevitably have been discovered by the agents. They took custody of Lewis's baggage and other possessions in the room and could have opened the attache case as part of a custodial search, *South Dakota v. Opperman*, 428 U.S. 364 (1976). In addition, in gathering Lewis's clothing, including shoes under the bed, the agents would have observed the first gun, which was near the shoes. Moreover, the agents obtained a search warrant to search the luggage of Lewis based on probable cause to believe that items worn in the robbery were contained therein. In all likelihood, the warrant would have included the attache case where the second firearm was found had it not been opened pursuant to Lewis's consent. See, e.g., *United States v. Frick*, *supra*.<sup>16</sup>

Furthermore, the search can be justified by the plain view doctrine, even if the guns are deemed to have been outside the immediate control of Lewis. *Coolidge v. New Hampshire*, 403 U.S. 443, 464-472 (1971). In *United States v. Candella*, *supra*, 469 F.2d at 175, the court noted that the defendant's statement that the guns were in the boxes was the equivalent of his opening the boxes for their inspection. When the defendant told the agents where the guns were, they were no longer concealed; in effect, they were in plain view, and it was reasonable for the agents to seize them.

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<sup>16</sup> There also was evidence that an attache case had been used during the robbery and thus may properly have been seized as evidence in plain view. *Coolidge v. New Hampshire*, *supra*.

## POINT II

### **Lewis's Post-Arrest Statement Was Admissible At Appellant's Trial.**

Appellant was indicted along with Lewis for conspiracy to rob, and armed robbery of, the Barclay Bank. As noted above, at the time of his arrest, Lewis stated, "I'm guilty, man. Money is my bag." Appellant contends that the statement was inadmissible against him because it was hearsay and was made after the conspiracy had ended.

As the Government argued to the trial court, the statement was not offered against appellant. The sole purpose of offering the statement was to prove Lewis's participation in the robbery.<sup>17</sup> The court appropriately instructed the jury, in its charge, that statements made not in furtherance of the conspiracy or after the conspiracy had ended may be considered as evidence only against the person making the statement (T. 479). It is axiomatic that since the Government charged a conspiracy, it would have to prove the participation of the co-conspirator in the conspiracy or crime. Similarly, since appellant was charged with aiding and abetting bank robbery, the Government had to prove that there was someone whom appellant had aided and abetted. The Government, therefore, was entitled to put in evidence proving the participation of Lewis in the conspiracy and crime. The statement of Lewis tended to prove his own, and only his own, participation in the crime.

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<sup>17</sup> Appellant did not request a limiting instruction at the time the evidence was admitted.

Furthermore, upon Lewis's taking the witness stand and refusing to testify on cross-examination about his commission of the bank robbery, the statement became admissible as an out-of-court declaration against penal interest by an "unavailable" witness under Rule 804(b)(3) of the Federal Rules of Evidence.

It only confirmed Lewis participated in the bank robbery, just as Lewis's testimony about his conviction did. The evidence therefore was relevant, and the judge's charge prevented misapplication of the evidence.

Moreover, in the instant case, Lewis, the declarant of the statement, testified at trial and denied making the statement (T. 367). Therefore, the jury had the benefit of hearing the declarant's version of the incident, and any problem inherent in lack of confrontation was eliminated.

Finally, appellant's reliance on *United States v. Floyd*, 555 F.2d 45 (2d Cir. 1977), is misplaced. Lewis's statement implicated only himself, whereas in *Floyd*, the defendant's admission implicated his co-defendant as well.

### POINT III

#### **The Weapons Found At The Time Of Appellant's Arrest Were Properly Admitted Into Evidence.**

At the time of appellant's arrest, the agents seized two .38 caliber revolvers<sup>18</sup> which were on top of a bureau, and a sawed-off shotgun, the butt of which was sticking out of a briefcase. The wooden stock of the shotgun had been removed, so that the weapon was much smaller than a sawed-off shotgun usually appears. All of these weapons were admitted into evidence at the trial, with a limiting instruction in which the court told the jury that appellant was not on trial for possession of weapons and that the

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<sup>18</sup> Agent Farrell testified at the suppression hearing that each of these weapons had been taken from bank guards during the course of armed bank robberies. One of the robberies occurred on September 8, 1976, and the other on November 3, 1976 (H. 55).



guns did not go to proof of the robbery unless connected to it by other evidence. He further stated that the guns only showed what appellant possessed when arrested (Tr. 225-226, 229).

Appellant contends that since there was allegedly no proof that any of these weapons were used during the robbery, they were irrelevant. He further argues that the only purpose for admitting them was to show his propensity for crime and that the evidence was highly prejudicial.

In an En Banc proceeding, this Court recently addressed the issue of the relevance of weapons similar to ones used in the commission of a crime. In *United States v. Robinson*, — F.2d —, Docket No. 76-1153, Slip op. p. 5021, 5022 (*En Banc*, Second Circuit, July 28, 1977), an accomplice testified that a gun that "looked like it might have been a .38 caliber revolver," was used in a bank robbery, and the defendant was arrested ten weeks later in possession of a .38 caliber revolver. The court held that evidence of possession of the gun ten weeks after the robbery was properly introduced and that the trial judge did not abuse his discretion in admitting the evidence. The court found that the proof of possession of the gun at the time of the defendant's arrest was "relevant," within the meaning of Rule 401 of the Federal Rules of Evidence, explaining that the evidence tended to identify the defendant as a participant in the robbery and corroborated the testimony of an accomplice. The court cited with approval the portion of the opinion in *United States v. Ravich*, 421 F.2d 1196, 1204 (2d Cir. 1970), *cert. denied*, 400 U.S. 834 (1970), which, in the context of a bank robbery case, stated that a jury can infer from the possession of a large number of guns at the time of arrest that the defendant possessed guns on or before the robbery. The *Robinson* court thus found the proof of possession of the gun admissible under Rule 404(b)

and relevant to show opportunity "since he had access to an instrument similar to that used to commit it." The court then cited the portion of *Ravich*, which held that evidence of possession of guns was relevant to establish opportunity or preparation to commit the robbery, which in turn would tend to prove the identity of the robbers. *United States v. Robinson, supra*, 5030-5031.<sup>19</sup>

In the instant case, the bank guard testified that the man, appellant, who disarmed him, held a gun to his head, and one of the eyewitnesses testified that appellant, after disarming the guard, tucked two guns into the waistband of his pants. The proof, therefore, established that appellant had a gun with him when he entered the bank. Although there was no direct proof that any of the weapons seized from appellant at the time of his arrest twelve weeks after the robbery had been used during the robbery, the guns were similar to weapons used at the bank in that each of the firearms could be held in one hand and could be tucked into the pants.

Assuming the relevance of a particular item of evidence, it is admissible if its probative value outweighs its prejudicial effect. Of course, the duty of balancing these interests is that of the trial judge, and his determination will not be disturbed on appeal unless he has abused his discretion, or acted arbitrarily or irrationally, *United States v. Robinson, supra*, 5034. In the instant case, the evidence was not offered until the end of the

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<sup>19</sup> FRE 404(b), which is a codification of "similar acts" case-law, provides as follows:

(b) Other crimes, wrongs, or acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Government's case, when "virtually all of the other proof had been introduced, by which time [the court] was in a better position to weigh the probative worth of the evidence against its prejudicial effect." *United States v. Robinson*, *supra*, at 5036.<sup>20</sup> At this point in the case, the trial judge had already heard the testimony concerning the use of the gun to disarm the bank guard, the identification of appellant by the guard and the chauffeur, the testimony about the large amounts of cash spent in Florida immediately after the robbery by appellant and his co-defendant, the use of aliases to hire the limousine and to register in hotels in Florida and New York, the escape of appellant from his co-defendant's hotel room, during which he had a gun, and his statement at the time of his arrest, "Admit it man, I'm the best." The judge was also aware, from testimony at the suppression hearing, of the fact, although this point was not before the jury, that the two revolvers had been stolen in previous robberies in a similar manner, thus indicating a similar plan or design, which in the weighing process, increased the likelihood that it was appellant who had taken those guns and had them in his possession on the day of the robbery. The record, the Government submits, demonstrates that Judge Platt, the trial judge, did not abuse his discretion in deciding that the probative value of the guns outweighed any prejudicial effect.<sup>21</sup>

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<sup>20</sup> In *Robinson*, unlike here, the guns themselves were not admitted. The instant case follows *Ravich* more closely in this respect; in *Ravich*, twice the number of weapons actually used in the bank were admitted, *United States v. Ravich*, *supra*, 1203-1204.

<sup>21</sup> See also *United States v. Campanile*, 516 F.2d 288, 292 (2d Cir. 1975), where a gun the defendant admitted he had with him but did not use in a non-violent bank theft at night was held to be admissible, and *United States v. Green*, — F.2d —, Docket No. 76-1438, Slip op. 5445 (Second Circuit, August 22, 1977), in which a gun in the defendant's possession at the time of his arrest was held admissible where it was probative of common plan or design.



Moreover, as noted above, the trial judge minimized the prejudicial effect by giving a limiting instruction at the time the weapons were put into evidence and by giving a very restrictive charge on the evidence at the close of the case. The court cautioned the jury that appellant was not on trial for possession of firearms and that the weapons were only admissible for a limited purpose, and could not be considered in connection with the robbery unless connected to it by other evidence (T. 225-6). Furthermore, during his charge, the judge instructed the jury that it could only consider the evidence of the guns found at the time of appellant's arrest if it "should find beyond a reasonable doubt that the accused did the act charged in the indictment." (T. 469). If the jury so found, Judge Platt stated, then the evidence could be used to determine whether the "accused acted pursuant to a common scheme or plan or otherwise acted wilfully, knowingly and with specific intent and not because of mistake or accident or other innocent reason." (T. 469).<sup>22</sup> The effect of this charge was to require the jury to find appellant guilty of the bank robbery before it could even consider the significance of the guns.

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<sup>22</sup> This charge follows closely the language of FRE 404(b). See footnote 19, *supra*.

**POINT IV****Agent Farrell's Testimony About Out-of-Court Photographic Identification Was Properly Received In Evidence.**

Appellant contends that Agent Farrell's testimony about out-of-court photographic identifications by Richard Casciano, Edna Bouyer and Norma Sharpe was hearsay and therefore improperly admitted. We submit that the claim is without merit.<sup>23</sup>

**I**

At the trial, Richard Casciano, the chauffeur, was asked if he saw in the courtroom the man whom, on January 3, 1977, he knew as "Mr. La Rosa." After looking around the courtroom, he pointed to appellant and stated, "That looks—I think I see him sitting over there with the green jacket" (T. 53). Casciano then testified that on January 18, 1977, FBI Agent Farrell showed him a photographic spread at the witness's house. He stated that he had identified one of the pictures as that of the man he knew as Mr. LaRosa (T. 54). Casciano was not shown in court the photographs he had seen in January.

Agent Farrell, testifying after Casciano, confirmed the chauffeur's testimony. Agent Farrell stated he had observed Casciano select a photograph of the man calling himself "Mr. LaRosa" who had been in the limousine on the day of the robbery (T. 219). In addition, Farrell identified Government's Exhibit 17 as the photographic

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<sup>23</sup> Appellant does not claim that the photospreads displayed to the witnesses were impermissibly suggestive or that the out-of-court identifications irreparably tainted any future identifications.

spread he had displayed to Casciano (T. 219), pointing out that the picture Casciano had selected was of appellant. Appellant objected to Farrell's testimony as hearsay, but the court overruled the objection on the ground that the identifying witness had been available for cross-examination (T. 220). We submit that Agent Farrell's testimony was properly admissible under Rule 801(d)(1)(C) of the Federal Rules of Evidence.

Federal Rule of Evidence 801(d)(1)(C) provides in pertinent part:

(d) Statements which are not hearsay.

A statement is not hearsay if—

(1) Prior statement by witness. The declarant testified at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (C) one of identification of a person made after perceiving him.

In his commentary, Judge Weinstein advises that statements about prior photographic identifications were intended to be included within this rule. Weinstein's *Evidence*, Volume IV, ¶ 801(d)(1)(C) [01], p. 107-108. He further offers this analysis concerning the question of whether Rule 801(d)(1)(C) allows persons present at any out-of-court identification to testify about the identification:

If the purpose of the testimony [of the observer] is merely to bolster the eyewitness credibility, no hearsay problem is presented. The statement of the observer or recipient of the fact of identification is being offered not to show the truth of the statement but to show that a statement of identification was made. . . . *Id.* 108



In this instance, Agent Farrell's testimony merely bolstered Casciano's testimony, by showing that an identification had taken place and by explaining that the person Casciano knew as LaRosa was in fact appellant. Judge Weinstein states that serious problems as to adequacy of cross-examination and right to confrontation, the rationales of the hearsay rule, arise when the eyewitness does not remember or denies the prior identification. *Id.*, p. 108-110. In the instant case, Casciano remembered and testified to the fact of the prior identification.

Appellant asserts in his brief that he did not cross-examine Casciano about his out-of-court identification because Casciano had not been shown the photographic spread in court; therefore, he argues, he was denied his right to confrontation on this issue. We disagree. Mr. Casciano was available for cross-examination on the subject. His testimony on direct about the prior identification opened the door to appellant to question the circumstances and reliability of the out-of-court identification.<sup>24</sup> And, it is interesting to note in this regard that appellant did in fact cross-examine the bank guard, Tunner Davis, about the circumstances of his out-of-court viewing of a photographic spread after Davis had testified that he had not been able to make an out-of-court identification.

Agent Farrell's testimony about Casciano's out-of-court identification clearly fitted within Rule 801. Moreover, the procedures used to introduce the prior identification have been sanctioned by the courts in numerous

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<sup>24</sup> In view of the fact that appellant concedes in his brief that the pre-trial hearing had established that Casciano's out-of-court identification was reliable (Appellant's Brief, p. 19), it is difficult to see what prejudice, if any, accrued to him from his failure to cross-examine Casciano on the subject.

decisions. See, *United States v. Forzano*, 190 F.2d 687, 689 (2d Cir. 1951); *United States v. Miller*, 381 F.2d 529, 537-38 (2d Cir. 1967), *cert. denied*, 392 U.S. 929 (1968); *United States v. DeSena*, 490 F.2d 692, 695 (2d Cir. 1973). See also, *United States v. Ruth*, 461 F.2d 1213, 1214 (D.C. Cir. 1972); *United States v. Anderson*, 406 F.2d 719, 720 (4th Cir. 1969), *cert. denied*, 395 U.S. 967 (1969).

## II

At the pre-trial hearing and at trial, Detective McGuckin of the New York City Police Department, testified that on January 15, 1977, after the arrest of Lewis in Room 2620 of the New York Hilton, he and other detectives waited in the room to apprehend appellant on the chance that he might come to the room (T. 114-118). He further testified that at about 12:30 P.M., appellant entered the room, caught sight of the detectives, bolted and fled down the hallway (H. 234). At about 1:00 P.M., after learning that appellant had taken a woman as a hostage in order to flee the hotel, McGuckin interviewed the woman, Edna Bouyer, about the circumstances of her abduction (H. 235). McGuckin said that during the interview, Mrs. Bouyer identified a picture of appellant, which had been found in the room, as the man who had taken her hostage (H. 237).

Mrs. Bouyer then testified at the pre-trial hearing that while working as a chambermaid at the Hilton, she was forced by a man with a gun to accompany him outside the hotel where he jumped into a cab and left the scene (H. 245-251). A short time later, while being interviewed by the police, she was shown some photographs and identified one of the men in the pictures as the man who had abducted her (H. 252). She further testified that on April 28, 1977, Agent Farrell showed her a photographic spread, and that she recognized one of

the pictures in the spread as being of the man who had held her hostage (H. 253-253a). This was, of course, appellant (H. 167). Mrs. Bouyer then dated and signed the back of the photograph and wrote on it: "This is the man that kidnapped me on 1/15/77." Appellant extensively cross-examined Mrs. Bouyer at the hearing about what she had been told by the law enforcement officials on each occasion.

In discussing the relevance of Mrs. Bouyer's testimony, the prosecutor explained that Mrs. Bouyer's testimony established appellant's intent to flee the hotel (H. 127). Her testimony would corroborate Detective McGuckin's testimony circumstantially establishing that it was appellant whom McGuckin saw bolt out of the room, and that appellant was avoiding apprehension rather than, perhaps, fleeing at the sight of strangers in his room.

It is evident from the discussion among the court, the prosecutor and defense counsel that the problem Mrs. Bouyer's testimony presented was how to establish her identification of appellant as the man fleeing from the hotel without admitting the inflammatory testimony about the basis for her memory of appellant's appearance, i.e. the abduction. See (H. 121-129, 293-295). The judge felt that Mrs. Bouyer's testimony was relevant but wanted to avoid the prejudicial testimony that would establish the reliability of the identification. To solve the problem, he proposed a compromise. He suggested that the parties draft a stipulation including the fact that if Mrs. Bouyer were called to testify, "she would say that she picked out from the six . . . photographs . . . , a picture of the defendant as a person she saw fleeing from the Hilton Hotel at 12:15 . . ." (H. 125). Defense counsel indicated that he would consider the suggestion (H. 127-128, 294-295).



Later, it was agreed that a stipulation would be worked out (H. 327). However, when the stipulation was drafted, it inadvertently failed to include the suggested wording of the court pertaining to the selection of appellant's picture, instead stating only that "a man whose picture she later identified" came into the room (T. 143). In order to cure this omission, Agent Farrell was called to testify that the "man whose picture [Mrs. Bouyer] later identified" was appellant (T. 221). Although appellant objected to Farrell's testimony, the judge, who read the stipulation and understood the purpose of it, overruled the objection (T. 221).

In sum, the purpose of the stipulation was to exclude testimony about the abduction, not to exclude Mrs. Bouyer's identification of appellant. Moreover, appellant never really contested the fact that he had fled the hotel. His objection, therefore, to Farrell's testimony is unfounded. Finally, the stipulation and evidence of Mrs. Bouyer's identification merely corroborated Detective McGuckin's testimony and was, in that regard cumulative.<sup>25</sup>

### III

As noted above, Mrs. Sharpe, a customer in the bank during the robbery, had identified pictures of Lewis on two occasions after the robbery. She was not called to

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<sup>25</sup> Additionally, we submit that the testimony about Mrs. Bouyer's out-of-court identification was admissible under the residual hearsay rule, FRE 803(24) in that the statement had substantial guarantees of trustworthiness and (A) was offered as evidence of a material fact, (B) was more probative in establishing appellant's flight than any other evidence procurable through reasonable efforts, and (C) the general purposes of the F.R.E. and interests of justice were best served by its admission. Moreover, appellant was on notice as to the Government's intention to offer the statement. See, *United States v. Medico*, 557 F.2d 309 (2d Cir. 1977).

testify in appellant's case. However, Arnold Gurevits, a security manager at a Miami Beach hotel, testified that he saw Lewis and appellant together at the hotel shortly after the robbery and had identified pictures of them that were shown to him by FBI agents (T. 81-84). In an effort to establish the reason for sending pictures of appellant and Lewis to Florida, Agent Farrell was asked whether he had shown a photo spread to Mrs. Sharpe. When asked to explain what happened at that time, appellant objected, and Farrell was allowed only to testify that he asked her if she recognized anybody, and that Mrs. Sharpe picked a photograph (T. 202, 206). He did not identify the person whose picture was selected. Therefore, there was no testimony about Mrs. Sharpe's out-of-court statement identifying Lewis. The testimony about the act of selecting a photograph, without the accompanying statement as to whose picture was selected, rendered the testimony meaningless.

Moreover, the testimony of Farrell about what he observed is not hearsay as that term is defined in Rule 801(c) of the Federal Rules of Evidence. To begin with, Mrs. Sharpe's nonverbal conduct was not intended by her to be an assertion. Secondly, the testimony was not being offered to prove that she correctly identified Lewis as one of the robbers. Rather, it was the fact that she had made an identification that caused Farrell to transmit pictures to Florida. Thus, Agent Farrell's testimony about Mrs. Sharpe's actions was no more hearsay than if he had simply said, "I interviewed Mrs. Sharpe and as a result of that interview, I took certain investigative steps," amounting to testimony simply about what he did.

**POINT V****The In-Court Identification By The Bank Guard Was Admissible.**

During the investigation of the bank robbery, an FBI agent displayed a photographic spread containing appellant's picture to the bank guard, Tunner Davis. Mr. Davis was unable to identify anyone in the spread. However, when Mr. Davis testified in court, he identified appellant as the robber who had disarmed him.

Appellant contends that when the bank guard identified him in court, Judge Platt should either have granted his motion for a mistrial or should have held a hearing to explore whether or not the in-court identification was the product of any impermissibly suggestive out-of-court identification procedures. The Government submits that the in-court identification was admissible and was not tainted by any pre-trial identification procedure, and that a mistrial was not necessitated by the identification.

At the pre-trial hearing, Agent Farrell testified that he assembled a photographic spread containing appellant's photograph and five other pictures (Government's Ex. 10) on January 18, 1977, and that therefore he displayed the photographs on separate occasions to Mrs. Sharpe, Mr. Casciano and Mr. Davis. (H. 67-68). Only Mr. Casciano was able to make an identification (H. 68).

On cross-examination at the hearing, Farrell testified that the spreads of Lewis and appellant were not displayed to Davis at the same time; Davis viewed the Lewis spread in early January and the spread of appellant weeks later (H. 221-222). Farrell stated that Davis had not identified appellant (H. 221-222), and the court found that the photo spread itself was not impermissibly suggestive (H. 69-71), a finding which appellant does not challenge on appeal.



At trial, Davis, who did not testify at the hearing, stated that he viewed for about a minute the face of the man who took his gun on the day of the robbery (T. 132). When Davis was asked if he saw the bank robber in the courtroom, the following occurred:

A. Well, the man who is sitting at the table there. But the only thing, his picture looks just like him, but I'm not sure.

Q. [Prosecutor] You're not certain?

A. Around his eyes or hair and his hat, it looks just like him. But I'm not sure.

Q. [Prosecutor] You're not sure whether or not that's the person you saw that day?

A. Not for sure. But I would say just that it would be the same guy. I hate to say it, but *he look just like the same guy*. Eyes and everything and moustache and around that. (Emphasis added) (T. 132-133).

After the prosecutor stated that she had no further questions, defense counsel moved for a mistrial, stating that the witness had not been presented as a witness at the pretrial hearing. The court denied the motion on the ground that the witness had not identified appellant from the photographs (T. 134-135). Appellant then cross-examined Davis about the occasions on which he had been shown photographs of the two robbers. Davis testified that he was shown photographs twice by the FBI—once for each bank robber (T. 135). When shown by defense counsel the photo spread with a picture of appellant, Davis recalled two of the photos, one of which was appellant's (T. 135). In response to counsel's further questionir g, Davis stated that appellant looked similar to his photograph, but stated that he was not relying on the photo to make the identification. Specifically, Davis explained, "I am making an identification

of the guy who stuck the gun to my head and said, 'That's a stick up,' That's the one, and *after* I see this [the photograph], I [am more certain appellant is the one.]" (emphasis added). It is clear from this testimony that the witness identified appellant from his memory of the events and not from the photograph, which he was shown after his identification. Indeed, the court found that Davis had spontaneously testified that he did not rely on photographs but on the encounter with appellant (T. 142-148).

In *United States v. Famulari*, 447 F.2d 1377 (2d Cir. 1971), a witness who had been unable to make a pre-trial identification of a defendant accidentally viewed the defendant in the courtroom shortly before testifying. The witness then identified the defendant during his testimony. Although the claim there was that the defendant had been denied his Sixth Amendment right to counsel when the witness saw him before being called to testify, the court noted that the defendant had conceded that the identification, if made from the witness stand, would have been proper. The court wrote that even if the prosecution had staged the pre-testimony viewing of the defendant, it was so close in time and circumstances to the in-court identification, that it neither tainted the in-court identification "nor infected the trial." *United States v. Famulari*, *supra*, at 1380-1381.

*United States v. Kaylor*, 491 F.2d 1127 (2d Cir. 1973) also involved an in-court identification by a witness who had been unable to make an identification before trial. In *Kaylor*, the driver of a hi-jacked truck testified, about the hi-jacking and upon leaving the stand informed an agent that he could identify the defendant as one of the hi-jackers. He was then recalled by the prosecutor to identify the defendant. In the context of discussing the Sixth Amendment confrontation problem this procedure had created, the court stated that the omission of asking the witness when he first testified whether he

could identify the defendant was inadvertent. It is apparent from these opinions that in-court identifications by witnesses who have been unable to make pre-trial identifications are not improper *per se*.<sup>26</sup>

Of course, if the in-court identification is tainted by improper pre-trial identification procedures, the in-court identification is improper. *United States v. Wade*, 388 U.S. 218 (1967). However, even if improper procedures have been used, the in-court identification may still be permitted when "in the totality of the circumstances," *Neil v. Biggers*, 409 U.S. 188 (1972); *Stovall v. Denno*, 388 U.S. 293 (1967), the identification appears to have been made on an independent basis, *Simmons v. United States*, 390 U.S. 377 (1968). The court in the instant case found that the identification was made not on the basis of any pre-trial viewing of photographs but on Davis's memory of the encounter with the robber. The witness's identification was made independently, therefore, of any pre-trial procedures.<sup>27</sup>

In this regard, the trial judge's decision will be given great weight because of his opportunity to view the witness's reaction, and the court's ruling will be heavily relied in determining whether the in-court identification was reliable. *Clemons v. United States*, 408 F.2d 1230, 1246 (D.C. Cir. 1968), *cert. denied*, 394 U.S. 964 (1969); *United States ex rel. Phillips v. Follette*, 428 F.2d 912,

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<sup>26</sup> In *Famulari* and *Kaylor*, voir dres were held either before or after the identification to determine their reliability. In the instant case, appellant did not request a voir dire; only a mistrial was requested. Appellant cross-examined Davis as to the basis of his identification, at the conclusion of which the court found it to be free from taint (T. 147-148).

<sup>27</sup> In view of the fact that Davis failed to identify anyone from the photographs, it would appear as most unlikely that there was any impermissibly suggestive techniques used with regard to the spread. In this connection, appellant's contention that Davis did identify someone before trial is inaccurate.



915 (2d Cir. 1970), *cert. denied*, 400 U.S. 908 (1970). In the instant case, the court's findings were made after the circumstances of the out-of-court identification procedures were brought out on direct and cross-examination of the witness, and they were supported by the record. Therefore the in-court identification was admissible, and a mistrial was not warranted.

Although appellant claims that the court should have held a subsequent voir dire out of the presence of the jury to determine the reliability of the in-court identification, he did not make such a request at trial, but instead chose to cross-examine the witness in the presence of the jury. Appellant therefore has waived his claim of error, if any, based on the failure of the court to hold a voir dire out of the presence of the jury. *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966).

## POINT VI

### **The Prosecutor's Questions And Lewis's Citations For Contempt Did Not Deprive Appellant Of A Fair Trial.**

During the cross-examination of the defense witness, Lewis stated that at great legal jeopardy to himself, in order to clear his conscience, he had to step forward to say that appellant was not in the limousine with him (T. 324-325). Later, the prosecutor asked him if he had participated in the attempted murder of a grand jury witness in a New York State case. Inadvertently, the prosecutor also asked if appellant had been involved in the attempt.<sup>28</sup> The court instructed the jury to dis-

<sup>28</sup> The prosecution previously had assured the court that she had no intention of bringing up the attempted murder allegation (H. 127) and later explained that the question was a slip of the tongue (T. 380a). It should be noted that there was a good faith basis for the question (T. 380).

regard the question, and during its charge to the jury explained that statements made by the attorneys during the questioning of witnesses were not evidence and could not be considered as evidence by the jurors and that evidence ordered stricken must be entirely disregarded (T. 481).

During the cross-examination, Lewis twice refused to give direct answers to the prosecutor's questions and was cited for contempt.

### A. The Prosecutor's Questions

Appellant contends that the prosecutor's question was so prejudicial that the court's instruction to disregard it was impossible for the jury to follow. He argues further that in the context of the trial, which lasted only three days and during which a number of other alleged errors occurred, the posing of the question could not be considered harmless. The Government submits that the question about appellant's participation in the attempted murder of a grand jury witness was harmless error, as the record, when viewed in its entirety, reflects.<sup>29</sup>

In the instant case, the question was not answered and an instruction to disregard the question was immediately given, two factors which courts consider in weighing the effect of the question on the jury. See, e.g., *United States v. Giallo*, 206 F.2d 207 (2d Cir. 1953),

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<sup>29</sup> The Government would submit that the question to Lewis was proper. Lewis stated that he felt he had to come forward and tell the truth about what happened on the day of the robbery. He felt as a matter of conscience that he should present the facts to the jury (T. 325). He therefore placed in issue his high regard for the truth and for insuring that justice was done. Attempted murder of a grand jury witness, on the other hand, directly controverts both his claimed regard for truth and justice and his lack of credibility in general. FRE 608(b) allows inquiry on cross-examination into instances of bad conduct for the purpose of attacking credibility of the witness if probative of truthfulness or untruthfulness. Certainly the bad conduct inquired of, amounting to obstruction of justice, is probative of untruthfulness.

*aff'd* 346 U.S. 929 (1954); *United States v. Rinaldi*, 301 F.2d 576 (2d Cir. 1962). Indeed, it has been recognized that defense counsel may well prefer to forego a curative instruction rather than have the question brought to the jury's attention through instructions. *United States v. Tramaglino*, 197 F.2d 928, 932, n.2 (2d Cir.), *cert. denied*, 344 U.S. 864 (1952). Additionally, there is no need for deterrent action where, as here, the Assistant United States Attorney has been warned of the impropriety of the conduct and freely admits error (T. 380-380a). *United States v. Pfingst*, 477 F.2d 177 (2d Cir.), *cert. denied*, 412 U.S. 941 (1973). Finally, in determining whether or not the prejudice was minimal, the court looks to the strength of the Government's case. *United States v. Pfingst, supra*, 477 F.2d 177.

The case against appellant was a strong one.<sup>30</sup> The chauffeur who drove appellant and Lewis to and from the bank made in-court and pre-trial identifications of appellant. The bank guard whom appellant had disarmed identified appellant in court. The gun which appellant had taken from the guard was found in his hotel room two weeks after the robbery. Appellant told the chauffeur that the white car made him nervous and Lewis asked if the chauffeur could take them to the airport that night—they in fact left the city the next day and did not return for ten days. Appellant and Lewis spent large sums of cash immediately after the robbery, and they both used aliases to rent the limousine, and to travel to and from Miami and to register at hotels. Appellant fled from law enforcement officers and was not apprehended until twelve weeks after the robbery. He had in his possession at the time of his arrest weapons, one of which may have been the one he pointed at the guard's head. Finally, when arrested by F.B.I. agents, appellant in a statement displaying incalculable bravado and "professional" pride, stated, "Admit it, man. I'm the best."

<sup>30</sup> Appellant makes no claim of insufficiency of evidence.



In addition, the jury's notes indicate that they carefully focused on the only issue in the case—identity. They asked to have read to them testimony about Vincent Brown's following Lewis out of the bank and seeing him and another man enter the limousine (T. 511). They compared Brown's account of what had happened outside the bank to that of the chauffeur, apparently to ascertain whether the men in the bank were the same as the men identified by Casciano. They requested the hotel and airline documents bearing the aliases (T. 501), as well as the bank surveillance photos. They also wanted to know whether Brown gave a physical description of the robber alleged to be appellant (T. 532). The jury deliberated from 12:35 until just before 4:00 p.m., and reached its verdict immediately after their question, whether Brown gave a physical description of appellant, was answered. The concerns of the jury seem to have been directed to the real issue in the case and indicate that the verdict was reached after careful, rational deliberation and that the prosecutor's question did not influence the verdict. *Kotteakos v. United States*, 328 U.S. 750, 764 (1946).<sup>31</sup>

Finally, the declaration of a mistrial is within the sound discretion of the judge. *United States v. Marshall*, 458 F.2d 446 (2d Cir. 1972). Here, where the judge could view first hand the effect of the question on the jury and gave an immediate instruction to disregard it, we submit the court did not abuse its discretion.

<sup>31</sup> See *United States v. Canniff*, 521 F.2d 565 (2d Cir. 1975), cert. denied, — U.S. —, 96 S. Ct. 796 (1976), where the prosecutor, in a narcotics case, asked the defendant if he had been convicted of grand larceny and burglary and had been adjudicated a youthful offender by New York State. See also *United States v. Leaman*, 546 F.2d 148 (5th Cir. 1977), where the prosecutor asked the defendant if he was aware of the drug problem in the community, and repeated it after an objection and instruction to the jury to disregard it; *United States v. Davis*, 546 F.2d 583 (5th Cir. 1977), where the prosecution asked a key defense witness whether the defendant had been captured while driving the car of a fellow inmate who had previously escaped and whether the defendant was a homosexual friend of that inmate.

The convictions in these cases were affirmed.

## B. The Contempt

Appellant also contends that the court improperly held Lewis, his only witness, in contempt. In essence, he argues that Lewis had not waived, in his direct testimony, his Fifth Amendment right to not incriminate himself. Appellant states that Lewis's testimony on direct was limited to admitting that he had been in the vicinity of the bank on the morning in question. The contention is without merit.

We submit that Lewis designed his testimony to lead the jury to believe that he had committed the bank robbery with "Jose," while not actually admitting participation, so as not to prejudice his future interests should he be granted a new trial after appeal.

In reviewing a contempt conviction, the record must be viewed in the light most favorable to the government, *United States v. Partin*, 524 F.2d 992 (5th Cir. 1975), *cert. denied*, 425 U.S. 904 (1976), to determine whether the evidence shows beyond a reasonable doubt, *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911); *United States v. Barnette*, 546 F.2d 187 (5th Cir. 1977), that the defendant wilfully, contumaciously, and intentionally disobeyed a clear unequivocal order of the Court. *Richmond Black Officers v. City of Richmond, Virginia*, 548 F.2d 123 (4th Cir. 1977).

In the instant case, Lewis came to the witness stand fully apprised of the possible consequences of his failure to directly respond to questions on cross-examination. He had been warned, prior to trial, by his own attorney that he could be deemed to have waived his Fifth Amendment rights if he testified and that he could be held in contempt if he responded to certain questions but refused to answer others (T. 271). Indeed, he had been advised by counsel to "take the Fifth as to each question" (T. 270). However, he ignored his counsel's

advice and appeared eager to testify on behalf of appellant, stating, "they definitely have the wrong man and I would like to present it to a jury" (T. 276). The court also warned him that he could not selectively answer questions (T. 277-278). Moreover, after the voir dire, but before allowing appellant to testify before the jury, Judge Platt directed Lewis to answer the question "whether or not he committed the robbery of Barclay's Bank on January 3". After conferring with counsel, Lewis again refused to answer the question directly, and the court attempted to ascertain whether he was "fearful that any answer, yes or no, might tend to incriminate him?" (T. 307-309). Despite this invitation by the court to invoke the Fifth, appellant did not respond, and his counsel merely stated, "Sir, he is well aware there is an appeal in this case, which is part of the response" (T. 310).

Thus, Lewis had been made fully aware, before testifying, of his Fifth Amendment right to not incriminate himself. Moreover, he was not reluctant to invoke that right when he was questioned about the attempted murder of a New York State grand jury witness (T. 337). Additionally, on three occasions, when ordered to answer questions directly, rather than by relying on the record of his own trial, Lewis did so.<sup>32</sup> Never-

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Q. Now, Mr. Lewis, at the time you were arrested agents found two guns in your room, is that correct?

A. So they say.

Q. Is that correct?

A. According to the records it is correct.

Q. Now, Mr. Lewis, again I will ask——

A. Let me answer that a better way then. The record will show I have never claimed possession of any weapon. The record will show that they claim that they took one pistol from under-

[Footnote continued on following page]



theless he refused to say whether or not he had gone into the bank and whether or not "Jose" had accompanied him. And on numerous other occasions, Lewis answered directly questions which would tend to incriminate him.

neath a bed, one out of an attache case which I voluntarily gave them the combination lock.

I deny that. (Q. 357).

\* \* \*

Q. Another gun was found there, do you recall that?

A. Yes, I do recall that was part of the testimony.

Q. Is it true?

A. According to my trial they considered——

THE COURT: Forget that. Were his statements to that effect true or not?

THE WITNESS. Were the statements concerning——

THE COURT: The possession of the gun, was it true or not true?

THE WITNESS: Not true. (T. 358-359).

\* \* \*

Q. Do you recall the testimony of Vincent Browne?

A. Was Mr. Browne the officer who testified at my trial?

Q. That is correct.

A. Yes, I recall.

Q. Do you recall he testified that he followed you out of the bank and saw you get into the limousine, or a person fitting your description, and wearing a specific coat?

A. Yes, I recall him making that testimony.

Q. Was that testimony truthful?

A. According to the outcome of my trial.

Isn't the Government satisfied that another—another decision by this particular Court——

THE COURT: Your position is not to ask questions.

THE WITNESS: It's all facts.

THE COURT: You are here to answer questions. Just answer the question.

THE WITNESS [Should properly read "The Court"]:  
Continue, please.

Q. Did you get into the limousine at the corner of Flatbush and Church?

A. I did get into the limousine at Flatbush. I don't know if it was Church or Linden Boulevard. (T. 361-362).

Clearly, Lewis was trying to manipulate the proceedings, answering only those questions it suited him to answer.

In sum, the record demonstrates that Lewis knew that he could invoke his Fifth Amendment right, but that when directed to answer two questions, he neither invoked his right nor answered the questions.<sup>33</sup> Clearly, Lewis knowingly, intelligently, and voluntarily waived his Fifth Amendment right by answering selected inculpatory questions. And since Lewis did not rely on that right in refusing to answer other questions, the court was justified in holding him in contempt.

A witness cannot pick and choose, as Lewis did here, which questions he will answer, *Yates v. United States*, 355 U.S. 66, 73 (1957). Once a witness testifies voluntarily, or under compulsion to testify gives evidence which is tantamount to an admission of guilt or "furnishes clear proof of crime," he will have waived his Fifth Amendment right against self-incrimination. *Brown v. United States*, 356 U.S. 148, 154-156 (1958).<sup>34</sup> By neither answering the question nor invoking his Fifth Amendment right, Lewis was trying to have the best of both worlds. He was trying to exonerate appellant without either denying or admitting his own guilt; the jury could not therefore fully judge Lewis's knowledge of the facts, his credibility

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<sup>33</sup> Appellant simply relied on the records of the court. Since he had not testified in his own trial, his reliance on the record was an insufficient answer as a matter of fact and as a matter of law.

<sup>34</sup> It is clear that Lewis appeared voluntarily. No subpoena was served upon him, and he told the court that he wanted to tell the truth about Quinones (T. 276, 320, 325). Moreover, his admission that he took the limousine to the vicinity of the bank (T. 320) along with his statement that he never told appellant about the bank robbery (T. 316) amount to admissions of guilt. Similarly, his statement that it was his fault that appellant was on trial (T. 333) are probative of both his desire to testify and his guilt.

and motive to testify. The court therefore was justified in directing the witness to answer. The jury was entitled to hear appellant's response to what the court termed "the key question" of whether or not he had gone into the bank.

Although appellant rests his argument on the assertion that Lewis did not waive the Fifth Amendment privilege by testifying the plain fact is that he did not assert the privilege when directed to answer the questions. The record reflects that Lewis's failure to do so did not stem from a lack of knowledge of his rights but from a deliberate defiance of the court's authority and a desire to disrupt the proceedings.

By not relying on a constitutional right, a right which the court was willing to recognize even though it had been waived, by refusing to respond with a factual answer, and by not even explaining on what ground he refused to answer, Lewis clearly showed his contempt for the court, and the court's findings to that effect were justified. *United States v. Martin*, 525 F.2d 703, 708, 710 (2d Cir. 1975), *cert. denied*, 423 U.S. 1035 (1975).

Appellant further contends that even if the contempt citation were proper, he was prejudiced by the citation in the presence of the jury because the citation adversely affected the credibility of the witness whose testimony exonerated him. He notes that the jury requested an instruction on how the contempt citation affected Lewis's credibility and erroneously states that the jury returned its verdict. <sup>1</sup>/<sub>c.</sub> Shortly after the charge on the contempt.<sup>35</sup>

<sup>35</sup> In fact the verdict was returned hours later, after several intervening questions focusing on the testimony which traced the robbers' steps from the bank to the limousine and asking for any description by Brown, who followed the robbers, of appellant. Apparently, the jurors were comparing Lewis's version of the events with that testified to by the Government's witnesses. This shows they did not disregard Lewis's testimony because of the contempt.



However the judge's charge to the jury, in response to its note, made it clear that it was free to totally disregard the contempt citations.<sup>36</sup>

Moreover, Lewis's credibility was damaged most by his own behavior on the stand. At first he tried to evade answering questions about the robbery by merely referring to the record of his own trial; this in itself reflected badly on his credibility. Then, when the court instructed him to answer, he still refused to give a direct answer to the questions. At that point, the jury was already aware of his disobedience of a court order, and the citation for contempt was a mere formality, adding little to the jury's impression of his behavior. Finally, Lewis's story about "Jose", who allegedly looked, by pure coincidence, enough like appellant to be misidentified as appellant, together with his claim of being a successful gambler and his characterization of appellant as his personal valet, was inherently incredible. We submit that the substance of Lewis's testimony did more to undermine his credibility than the contempt citations.

In *United States v. Variano*, 550 F.2d 1330 (2d Cir. 1977), the trial judge cited for contempt a Government witness who had taken the Fifth and then evaded the Government's questions after being instructed to answer it; the witness was cited for contempt in the presence of the jury. The court found that the judge had handled

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<sup>36</sup> The court charged as follows:

THE COURT: Now, with respect to the two contempt citations that the Court found with respect to Mr. Lewis, you may, in your discretion use or not use such conduct in weighing such or giving such credence, if any, as you may wish to give Mr. Lewis's testimony on the matters as to which he testified in this case.

In other words, you may or you may not, as you elect, choose to weigh such conduct in determining what credence, if any, you are going to give to his testimony. (T. 507)

the situation reasonably and found no prejudice to the defendant. Although the court did not discuss the issue at length, it seems clear from the decision that citation for contempt in the presence of a jury is not error. In the instant case, the court was correct in deciding that the jury had a right to know that the witness could not lawfully refuse to answer questions and that the jury could give that refusal such weight as it deemed it deserved.

### CONCLUSION

**The judgment of conviction should be affirmed.**

Respectfully submitted,

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Eastern District of New York.*

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(Of Counsel).*





# AFFIDAVIT OF MAILING

STATE OF NEW YORK  
COUNTY OF KINGS  
EASTERN DISTRICT OF NEW YORK } ss

DOLORES M. BYRD

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 29th day of September 19 77 he served a copy of the within  
BRIEF FOR THE APPELLEE

by placing the same in a properly postpaid franked envelope addressed to:  
THOMAS J. BRIEN, ESQ., 230 PARK AVENUE, NEW YORK, NEW YORK 10017

and deponent further says that he sealed the said envelope and placed the same in the mail chute  
drop for mailing in the United States Court House, <sup>225 Cadman Plaza East</sup> ~~Washington Street~~, Borough of Brooklyn, County  
of Kings, City of New York.

*Dolores M. Byrd*

Sworn to before me this

29th day of September 19 77

*Barbara A. Allen*

BARBARA A. ALLEN  
Notary Public, State of New York  
No. 24-646824  
Qualified in Kings County  
Commission Expires March 30, 1979

